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IN THE

Supreme Court of the United States

October Term, 1997

JOHN AND PATRICIA GLAVARIS; BENNY L. TOLLEY; JOEL BINDER; MARIT FIDEL; BERNARD FIDEL,
Petitioners,

vs.

HERBERT J. YOUNG; JAMES N. THAYER, JAY JANIS; JOHN R. WILLIAMSON; MICHAEL W. MOONEY; LYNNE CRAWFORD; LINDA K. S. BLOUNT; ROBERT R. SPRAGUE; HOUSTON I. FLOURNOY; BERNICE. HUTTER; MELVIN P. SPITZ; RAFAEL E. VEGA; GIBRALTAR SAVINGS; GIBRALTAR SAVINGS, F.A.; MELVIN RIFKIND; GIBSON DUNN & CRUTCHER; KPMG PEAT MARWICK; ALVIN KANG; ERNST & WHINNEY; ERNST & YOUNG; WILLIAM H. DUDLEY; MELVIN RIFKIND; RIFKIND, PONDEL & PARSON; KENNETH LEVENTHAL & COMPANY; RICHARD SPRAYREGEN; THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Gibraltar Savings and Gibraltar Savings, F.A.,
Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Robert H. Bretz, Esq.
520 Washington Blvd.,#428
Marina del Rey, CA 90292
310/578-1957
Attorney for Petitioners

HIPP

QUESTIONS PRESENTED

1. In ruling on defendants' motions to dismiss under Rule 12(b)(6) in a Rule 23 action, is the court required to accept the plaintiffs' definition of the class as set forth in the complaint or is the court entitled to re-define the class into three separate classes, including where the court has previously refused to allow intervention by members of the class as named plaintiffs in respect of claims dismissed by the court as constituting claims represented by one of the classes defined by the court based on the lack of a separate representative plaintiff for each separate class period/claims and refused to allow any amendment of the complaint for the purpose of adding any new plaintiffs and class representatives?

In the instant case, the court first refused to allow members of the putative class to intervene as plaintiffs then, for purposes of ruling on the defendants' motions to dismiss, re-defined the class in a manner which the court determined resulted in the absence of a class representative for the particular period wherein the plaintiffs-in-intervention had sought to intervene (and the court subsequently refused to allow amendment of the complaint to allow intervention by any additional plaintiffs and class representatives even though proceedings in the case remained stayed pending final disposition of all motions to dismiss and, accordantly, no responsive pleadings had been filed and no discovery had been conducted).

2. In granting defendants' motions to dismiss, is the court entitled to refuse to apply Rule 23 tolling under this Court's *American Pipe* line of cases to preserve stockholder and bond holders claims against defendants who were named as defendants in a prior Rule 23 class action but who were dismissed for purposes of the settlement of stockholder only claims in such putative class action where the factual

allegations in such prior class action were sufficient to cover both stockholder and bondholder claims?

In dismissing the plaintiffs and the class' claims in what the court defined as "period 1", the court declined to apply Rule 23 tolling to the instant stock and bondholder claims under Rule 10b-5 even through such stockholder claims were against defendants who were originally named but had not participated in the prior class action settlement and the factual allegations in such prior class action covered both stock and bondholder claims but the settlement covered only stockholder claims against a certain limited number of defendants.

3. Was it error for the court to refuse to apply fraudulent concealment, equitable tolling and equitable estoppel theories to the facts and circumstances of this Rule 10b-5 case, including the court's refusal to suspend the plaintiffs' inquiry duty occasioned by the corporate defendant's announcement of large losses where the defendants purported to conduct a special investigation by the "outside" members of the corporation's board of directors and corporate counsel into the facts and circumstances surrounding such losses and publicly reported that such special investigation could find no evidence of any actionable conduct by corporate management?

In the instant case, the defendants had purported to cause a special independent investigation to be conducted into the matters which were the subject of the corporation's loss announcement (which press release the court determined constituted constructive notice of possible fraud) and, thereafter, reported that such special investigation could find no evidence of any actionable conduct by the corporation's management. Nevertheless, the court declined to apply principles of fraudulent concealment, equitable tolling or equitable estoppel to preclude the defendants from asserting that such (constructive notice) statute of limitations in respect

of the plaintiffs' Rule 10b-5 and other claims continued to run following announcement of the findings of the special investigation thereby cutting-off the plaintiffs' claims by approximately two weeks before the action was filed.

4. Are actions by professional defendants such as accountants, attorneys and financial public relations firms, who participate directly in the fraudulent activity of corporate defendants, cognizable under Rule 10b-5 notwithstanding the fact that the plaintiffs are unaware at the time that such professionals were involved in the making of such false or misleading statements or other wrongful conduct?

In the instant case, the court dismissed plaintiffs' Rule 10b-5 claims against the corporation's accountants, attorneys and financial public relations firm, which professional defendants were direct participants in the fraudulent statements and conduct alleged in the complaint, on the basis that there was no public attribution of any of the alleged false and misleading public statements to any of such defendants and that such defendants could not be held liable for any "non-verbal" conduct under Rule 10b-5.

5. Were the plaintiffs entitled to the benefit of favorable inferences to be drawn from the allegations of a "pattern of racketeering activity" as set forth in the complaint to establish for pleading purposes a RICO association-in-fact "enterprise"?

The court dismissed the plaintiffs' RICO claims without leave to amend based on the court's determination that the complaint failed to adequately allege the "enterprise" element of such claim in that the plaintiffs were not entitled to plead the existence of such enterprise based in whole or in part on inferences drawn from the allegations of the pattern of racketeering activity alleged in the complaint.

LIST OF PARTIES

All parties appear in the caption as presented on the facing page of this petition.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below including the court's order denying the intervention by petitioners Binder and Fidel in the *Glavaris* action.

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit and order denying rehearing appear, respectively, as Appendix A and B to this petition.

The memoranda of decision of the United States District Court for the Central District of California (Mariana R. Pfaelzer District Judge, Presiding) dated September 8, 1992 and August 10, 1994 appear, respectively as Appendix D and E.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit issued its order denying the petition for rehearing was June 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The primary basis for jurisdiction in the District Court was under 15 U.S.C. §78aa (Rule 10b-5 claims), and 18 U.S.C. §1964 (c) (RICO claims).

STATUTES, REGULATIONS AND RULES INVOLVED

This petition implicates Federal Rules of Civil Procedure ("FRCP") Rules 12(b)(6) and 56 and Rules 23 and 24(a) in respect of the petitioners' submissions that the District Court was not entitled to re-define the putative class, to differ from the definition of the class set forth in the complaint for purposes of such court's dismissal of the plaintiffs and the class' Rule 10b-5 and other class claims and preclude intervention by members of the putative class at the outset of the case. However, the precise language of

the above referenced Rules does not appear to directly impact on the Court's decision in respect of the within petition; and, accordingly, such Rules are not reproduced in this section of the petition. The same is true of Section 10(b) and Rule 10b-5 in respect of the petitioners' submission that claims may be maintained against persons who were not identified or otherwise known to the claimants to have been violating such statute and rule at the time of such violation.

RICO "Enterprise"

18 U.S.C. §1961(6)

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"

18 U.S.C. §1962(c)

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity or collection of unlawful debts"

STATEMENT OF THE CASE

The petitioners purchased Gibraltar Financial Corporation's ("GFC") common stock ("stock") and public

debt securities ("bonds") in the public trading market for such securities during the period January 1, 1986 through April 30, 1989, and thereafter. GFC was a publicly owned holding company for its Gibraltar Savings & Loan subsidiary based in Beverly Hills, California ("Gibraltar Savings") which S&L was GFC's only meaningful asset and business (collectively herein "Gibraltar"). Gibraltar Savings was one of the fifteen largest U.S. savings and loans. In its annual report for 1985, and thereafter, Gibraltar indicated that it would emphasize variable rate mortgages to avoid interest rate risk, and that its commercial real estate investments were valued quarterly for financial statement purposes based on appraisals and comparisons of value. *(Gibraltar did not really have any such appraisals or comparisons of value, and such representation was entirely false).* Following a public announcement by Gibraltar on October 30, 1987, that it was taking an after tax charge of approximately $155 million in respect of anticipated losses attributable to its commercial real estate development activities, Gibraltar announced in its year-end 1987 Annual Report To Stockholders, and otherwise publicly disclosed, that it was in sound financial condition and would be profitable in 1988. Gibraltar's October 30, 1987 release, Gibraltar's 3rd Quarter financial statements and Gibraltar's 1987 year-end financials, did not mention any other losses or anticipated losses. Prior to the date of such press release, on October 20, 1987, Gibraltar and its board members and attorneys received a written report following special audit by the FHLB (Federal Home Loan Bank of San Francisco), which agency had regulatory authority over Gibraltar, reporting that the FHLB had concluded that Gibraltar Savings was in an "unsafe and unsound" financial condition as a result of unreported losses attributable to Gibraltar's portfolio of fixed-rate mortgage backed securities equal to approximately $500 million. *(The October 30th release was an instrument of the Gibraltar fraud in that it did not disclose the true nature, timing and*

reason for the real estate losses which were reported therein and did not report the existence of losses attributable to Gibraltar's portfolio of fixed rate mortgage-backed securities which losses, the FHLB had concluded, rendered Gibraltar "unsafe and unsound").[1/] In the 1st Quarter of 1989,

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[1/] The October 30th release stated, in pertinent part, as follows: "Beverly Hills, California - - October 30, 1987 - - Gibraltar Financial Corporation (NYSE:GFC) announced today that is accelerating plans to focus on its traditional core savings and loan business. To accomplish this, GFC has commenced a program to expedite the sale of real estate investments and has provided for anticipated losses on sale . . . Herbert J. Young, Chairman and Chief Executive Officer, stated: "These actions are intended to improve future net interest income and profitability". The decision to phase out its construction and development activities and to expedite the disposal of real estate investments, rather than to continue to hold them for investment, required a $147.1 million third quarter writedown. The Company also recorded a $92.0 million third quarter provision for loan losses primarily associated with commercial real estate properties that did not meet occupancy, lease and/or sales projections.

Due primarily to the foregoing writedown and provision for losses, the Company incurred a net loss for the third quarter of $154.6 million, compared with net earnings of $13.3 million in the corresponding quarter last year . . . Total assets at September 30, 1987 amounted to $14.3 billion".

The financial press reporting on such release did not even speculate as to any wrong doing by Gibraltar's management in respect of the subject matter of the announcement, namely Gibraltar's decision in the 3rd Quarter of 1987 to discontinue its commercial real estate development and loan business and to expedite the sale of its commercial real estate assets in a manner which it was anticipated would result in substantial losses. The reporting of large losses, even very large losses, does not by itself implicate wrongdoing by corporate management - - let alone the corporation's outside accountants, attorneys and financial public relations firm. The release, issued by Gibraltar during the aftermath of the October 19, 1987 market "crash", was an instrument of the Gibraltar fraud - - which fraud permeated the artificial time periods constructed by the court.

Gibraltar announced losses from operations for 1988 of approximately $101 million. It was not until January of 1989 that Gibraltar first publicly announced that the FHLB had concluded that Gibraltar was "unsafe and unsound" as a result of substantial losses attributable to its portfolio of fixed rate mortgage-backed securities. Shortly thereafter, the FDIC (Federal Deposit Insurance Corporation) acting as agent for the FSLIC (Federal Savings and Loan Insurance Corporation), and subsequently the RTC (Resolution Trust Corporation) (collectively herein sometimes the "Government"), placed Gibraltar Savings into a conservatorship and subsequently into a receivership which resulted in the liquidation of such savings and loan business. In the process, in May of 1989, the Government used a previously undisclosed capital maintenance agreement with GFC to seize all of GFC's cash resources on deposit with Gibraltar Savings, which in turn forced GFC to default on interest and principal payments on its publicly owned/traded bonds. GFC sought the protection of the U.S. Bankruptcy Court, but its efforts to reorganize were unsuccessful, and GFC was ultimately liquidated. As a result of the Government's seizure of Gibraltar Savings and of GFC's cash resources, and the resulting bankruptcy and liquidation of GFC, the petitioners' and the other owners of Gibraltar's stock and bonds received virtually nothing and lost their entire investment in Gibraltar securities. The *In re Gibraltar* Rule 10b-5 class action was filed and eventually settled as to stockholder claims against a certain limited number of the defendants named in such action, namely defendant Young. Gibraltar's bondholders, approximately 5,000 investors, have never recovered any amount in respect of their claims.

Although not reported or otherwise disclosed until after the settlement of the *In re Gibraltar* class action, it was ultimately revealed as a result of litigation by Mercatura Trust which was one of GFC's largest stockholders and an

"opt-out" from the stockholder class action settlement, that (1) Gibraltar had in hand the FHLB's written report dated October 16, 1987, assessing unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities at $500 million and determining that Gibraltar Savings was "unsafe and unsound" - - on October 20, 1987 - - which report was received prior to the issuance of Gibraltar's October 30, 1987 real estate loss announcement, (2) Gibraltar had issued two different versions of its 1986 Annual Report To Stockholders including audited consolidated financial statements for the year ended December 31, 1986 - - one of which (filed with the U.S Securities and Exchange Commission) showed that Gibraltar Savings' largest real estate development project (the Metairie Galleria) had been sold out and transferred off of Gibraltar's consolidated Balance Sheet at December 31, 1986 and one of which (mailed to stock and bondholders) reflected that such real estate development project was owned by Gibraltar at December 31, 1986 and was being held as a long-term investment, without disclosing the existence of such two different sets of annual reports/financial statements, (3) the independent appraisals and comparisons of value, upon which Gibraltar had been representing its real estate assets were valued for financial reporting purposes, did not exist, (4) in September of 1986 Gibraltar had actually refused to take delivery of and had cancelled an independent real estate appraisal on its largest single real estate property as referenced above because such appraisal reflected that Gibraltar Savings had suffered a loss in respect of its investment in such property in excess of $30 million wiping out substantially all of the $49 million in "record earnings" reported by Gibraltar for the year ended December 31, 1986, (5) no audit of Gibraltar's single largest real estate property, the Metairie Galleria, had been conducted for purposes of the issuance of the audit report and opinion on the second version of Gibraltar's 1986 consolidated financial statements

reflecting Gibraltar Savings' ownership of such property, (6) the Government regulatory agreement, which required GFC to maintain the minimum regulatory capital of its Gibraltar Savings subsidiary as required from time to time under applicable law and which was used as the basis for the Government's seizure of all of GFC's cash resources in May of 1989, had been in existence since as early as May of 1987, and (7) that, in light of the Government regulators' determination that Gibraltar Savings was "unsafe and unsound", such regulators had notified Gibraltar in December of 1987 that they had serious concerns about Gibraltar Savings' ability to continue as a going concern.

None of the foregoing facts were reported or otherwise disclosed by Gibraltar for the benefit of its securities holders or prospective public investors. Notwithstanding receipt in October of 1987 of the FHLB's written report and determination that Gibraltar Savings was "unsafe and unsound" as a result of unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities in excess of $500 million, GFC's 1987 Annual Report To Stockholders issued in early 1988 stated, in two places in Young's "President's Letter To Stockholders", that Gibraltar was in sound financial condition. To the contrary, GFC was dependent upon the cash it received from (and maintained on deposit with) Gibraltar Savings for the payment of interest and principal on its outstanding public debt securities; and the undisclosed regulatory agreement between GFC and the FHLB virtually assured GFC's default on its obligations to public bondholders if Gibraltar Savings' financial condition deteriorated and GFC was forced to infuse Gibraltar Savings with additional capital pursuant to the regulatory agreement. None of the foregoing facts were disclosed by Gibraltar or otherwise discovered and known during the course of, and at the time of the settlement of, the *In re Gibraltar* class action

litigation. In respect of such settlement, and in defense of this action and in all related litigation, the defendants denied any wrongdoing including in respect of the real estate losses, mortgage-backed securities losses and/or the imposition of a Government conservatorship over Gibraltar Savings and ultimate liquidation of both Gibraltar Savings and GFC.

The notice of proposed settlement in the *In re Gibraltar* case, prepared by the parties' and their attorneys, approved by the Court as submitted and sent to all members of the proposed settlement class pursuant to FRCP Rule 23 for purposes of the hearing on the parties' stipulation/motion to approve the settlement (and possible objections and/or opt-outs therefrom), stated that such settlement, for $8.5 million, would consume substantially all of Gibraltar's available O/D's liability insurance. The settlement notice did not say anything about the cancellation of up to $40 million of insurance otherwise available to pay claims of the class in respect of their ownership of Gibraltar stock and/or in respect of Gibraltar bonds owned by such class members and other Gibraltar investors.

At the hearing on the proposed settlement of existing stockholder claims, the FDIC sought to file an objection to the settlement on the basis that such agency, which was administering the Gibraltar Savings receivership on behalf of the FHLB prior to the inception of the RTC, had learned that the proposed settlement, and funding thereof by Gibraltar's insurance carrier, was conditioned upon cancellation by Gibraltar and the insured O/D defendants of a policy maintained by Gibraltar and otherwise available to satisfy claims by Gibraltar stock and bondholders. Neither the availability of insurance substantially in excess of $8.5 million, nor the plan to cancel insurance otherwise available to pay stock and bondholder claims, was reported in or otherwise disclosed to the District Court in the parties' joint

stipulation and motion for approval of settlement or in the notice prepared by the parties, approved by the court and mailed to all members of the class sometime after the July 11, 1989 date thereof. At the hearing on approval, the District Court ruled that the FDIC did not have standing to object to the proposed settlement and would not be allowed to make the proposed objection and that, in any event, the FDIC's proposed submission to the court was not timely. No class members were in attendance at the hearing. Notwithstanding the obvious deficiency in the Rule 23 notice mailed to the class for purposes of the settlement hearing (and decisions by class members to opt-out of the class or otherwise take action to protect their own individual interests), the court ruled that (1) the notice previously mailed to the class was sufficient to satisfy Rule 23's requirements and (2) the settlement was fair, reasonable and adequate. The court approved the settlement knowing that it involved the cancellation of insurance in the approximate amount of $40 million otherwise available to the class and opt-outs in respect of both their stock (which were covered by the settlement) and bond claims. The stockholder settlement, and *In re Gibraltar* case, was finally concluded on September 19, 1989.

Named plaintiffs John and Patricia Glavaris purchased Gibraltar stock and bonds at various times throughout the class period (January 1, 1986 through April 30, 1989). (To no avail, the Glavaris also tried to improve their position as creditors in the GFC bankruptcy proceeding in June of 1989 by selling one class of bonds and purchasing a more senior issuance of Gibraltar bonds). Benny Tolley purchased Gibraltar bonds during the class period. Glavaris opted-out of the *In re Gibraltar* stockholder settlement (which did not cover bondholder claims). Glavaris and Tolley filed the instant class action for themselves and on behalf of bondholders and stockholders including on behalf

of Gibraltar stockholders against those defendants in the *In re Gibraltar* action who were named but did not participate in the settlement of such action or who were not previously named as defendants in such action. (A draft of the *Glavaris* complaint had been provided to the defendants' counsel in the Summer-Fall of 1989, but such counsel had requested that the plaintiffs refrain from filing the complaint because the defendants were attempting to negotiate a "global" settlement, which would include all stock and bondholder claims, with Gibraltar's insurance carrier to be implemented in the *In re Gibraltar* action). Petitioner Joel Binder purchased Gibraltar bonds during the class period. Petitioners Bernard and Merit Fidel were Gibraltar stockholders and bondholders who participated in the settlement of their stock claims in the *In re Gibraltar* action. Both Binder and the Fidels sought (but were denied) leave to intervene as name plaintiffs and class representatives at the outset of the instant action. The defendants moved under FRCP Rule 12(b)(6) to dismiss the complaint in this (the "*Glavaris*") action. For purposes of such motions, the court re-defined the class into three separate periods[2/], and ruled

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[2/] **Period 1**: January 1, 1986 through November 3, 1987 (Gibraltar's October 30th release was publicly reported in the press); **Period 2**: November 4, 1987 through April 3, 1989 (Government conservatorship of Gibraltar publicly reported); and **Period 3**: April 4, 1989 through November 16, 1990 (date of filing the instant action). In attempting to justify re-defining the class into three separate class, the court may have confused the legal viability of such claims (on a stand alone basis and as extending from one period to another) with the need to establish damages associated with claims existing at various times throughout the class period stated in the complaint. The difficulty in establishing damages should not, however, be allowed to defeat the existence of the claims of the plaintiffs and the class in the context of a 12(b)(6) motion. The October 30th announcement did not disclose any basis for believing the losses reported therein were the result of fraud by any of the defendants - - especially Gibraltar's outside professionals. In fact on August 12, 1988 and again in April of 1989, Gibraltar and its

that the plaintiffs and the class' claims could only exist within the boundaries of each of the three separate periods as defined by the court. The court ruled that the plaintiffs' Rule 10b-5 claims in period 1 were precluded as a matter of law as a result of the October 30th loss announcement and the resulting preclusion of such claims based on constructive or inquiry notice and application of the three year statute of limitations period, that the named plaintiffs had not purchased any Gibraltar stock in period 2 (which the court later acknowledged in MOD#2 was not the case but refused to re-instate the plaintiffs and the class' period 2 claims[3/])

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attorneys, who gave interviews to the press, reported that a special independent investigation conducted in respect of such losses had concluded that there was no actionable conduct by Gibraltar's management. The April 3, 1989 announcement reported the imposition of the Government conservatorship, and did not report any wrongdoing by Gibraltar's management. Gibraltar's management, thereafter, mailed a letter to all of Gibraltar's securities holders denying that there was any basis for the imposition of such conservatorship, and vowing to challenge the conservatorship as unlawful. The court rejected plaintiffs' allegations that the defendants' fraud, relating to the nature, reasons and timing of Gibraltar's real estate losses and the existence of losses attributable to Gibraltar's fixed rate mortgage-backed securities and resulting "unsafe and unsound" financial condition, permeated the entire class period as stated in the complaint, including the time frame the court defined as class periods 1 and 2.

[3/] When the court realized that John Glavaris had completed the purchase of Gibraltar securities on November 4, 1987, and was thus a "purchaser" in the court's period 2 class period, the court was still unwilling to acknowledge Glavaris' claim and standing to represent the stock and bondholder claimants for Rule 12(b)(6) purposes stating that it was the court's belief that Glavaris could not possibly have been relying upon any material misrepresentation (or omission) in deciding to purchase Gibraltar securities on that date and that he must, therefore, have been speculating that Gibraltar's securities would go back up following the loss announcement which the court found to have been

and, therefore, such plaintiffs lacked "standing" to assert any individual claims (federal or state and/or act as class representatives for such period 2 claims, and because the basis for the claims in the court's period 3 time frame was the same as for period 2 and the April 3rd conservatorship announcement precluded investor reliance on any wrongdoing in period 2 serving as the basis for any period 3 claims (notwithstanding the Gibraltar defendants' public denial of wrongdoing in any of such periods).[4/] Furthermore, the court reconsidered and confirmed its prior decision that no class members including Binder and the Fidels would be allowed to intervene to represent the interests of the class in any period in respect of which the named plaintiffs had not purchased any Gibraltar securities (because, due to the named plaintiffs' lack of standing in period 2, there was no class action in which to intervene). The court did, however, permit John Glavaris' individual Rule 10b-5 stockholder, and several related state law, claims to proceed against defendant Young.[5/] All of the class

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disseminated into the market by November 3rd (but never inquired as to if and when John Glavaris actually learned about the loss announcement - - which was sometime after November 4th - - for purposes of his individual reliance claim under Rule 10b-5).

[4/] The court dismissed all of the plaintiffs' claims under Rule 12(b)(6), except as to the statute of limitations ground for such dismissal (period 1 claims), based on Gibraltar's October 30th press release, in respect of which the court treated the defendants' motions to dismiss as motions for summary judgment under FRCP Rule 56.

[5/] Order dated August 10, 1994 ("John Glavaris' individual claim against Young for violation of Section 10(b) and Rule 10b-5, breach of fiduciary duty based on a fraud theory, fraud and deceit, and negligent misrepresentation" would proceed following

periods as defined by the court, and the class period actually stated in the complaint, are co-extensive with the period of time in respect of which the defendants publicly denied any wrongdoing including based on the special investigation which was conducted and was reported to have exonerated Gibraltar's management from responsibility for any wrongdoing - - which claims the court ruled the plaintiffs and the class should have nevertheless been able to discern and initiate, notwithstanding the published results of the special investigation, on or prior to November 2, 1990 when the statute of limitations on such parties' "period 1" claims ran out (November 3, 1987 through November 2, 1990) based on the court's constructive notice analysis and ruling.[6/] The complaint in this action was filed November

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issuance of MOD#2 and lifting of stay). On November 13, 1995, plaintiff John Glavaris entered into settlement agreement, subject to court approval, disposing of his then remaining individual Rule 10b-5 and state claims against defendant Young and his remaining individual proxy claims against both defendant Young and the remaining individual O/D defendants. The settlement agreement between plaintiff Glavaris and the settling O/D defendants covered only such plaintiff's few remaining claims in this action (individual Rule 10b-5 and pendant state claims against Young and an individual proxy claims against al of the director defendants); and such agreement, by its terms, expressly reserved to Glavaris and to and for the benefit of the class, the instant appeal of the dismissal of all claims in this action previously dismissed by the court. The settling parties filed a motion for determination of good faith settlement; and on February 7, 1996, the court approved the parties' motion for good faith settlement determination, and dismissed plaintiff John Glavaris' remaining claims as described above, and issued judgment thereon.

[6/] Gibraltar's October 30th press release was not mailed or otherwise furnished to Gibraltar's securities holders. The release

16, 1990 (which was within the three year period following

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was the subject of several articles published in the financial press including the *Los Angeles Times* and the *Wall Street Journal*, which reported favorably on Gibraltar's decision to get out of the commercial real estate business and concentrate on its traditional S&L business. Such articles appeared on or about November 3, 1987. The *WSJ* reported that Gibraltar "stretched themselves too thin by making a lot of real estate loans out of state, out of their area of expertise . . . They will have to hunker down for a while and stick to their basic business". The *Los Angeles Times* article quoted Robert Morris, Assistant Commissioner for the California Department of Savings and Loan, stating that Gibraltar was "an old established company. They took a hit, but we don't see any reason for concern", and quoted Herbert J. Young, who told the Times reporter - - "Believe it or not, this company is much stronger after doing this . . . This is not going to happen again." The release, and the articles reporting on such announcement, did not put readers on notice of possible fraud. The announcement of large losses does not, by itself, implicate fraud by the reporting company's management (and certainly not by its outside professionals). The release was designed to and did cover-up and conceal the prior existence of losses from Gibraltar's real estate operations during 1985-1986 when Gibraltar had been reporting "record earnings". The market price of Gibraltar's stock actually edged up slightly in the several weeks following the October 30th announcement. (The price of Gibraltar stock certainly did not "plummet" as referenced by the court in its MOD#1. (Appendix F). The court's constructive notice theory for dismissing the plaintiffs and the class' "period 1" claims is based on the proposition that Gibraltar's public investors should have been able to find what the financial press, and the special investigation committee and its professional advisors, did not find. None of Gibraltar's published financial statements, issued after the October 30th announcement, reflected or otherwise reported any liability or contingent liability associated with any wrongdoing by Gibraltar's management in respect of the subject matter of the October 30, 1987 announcement or otherwise.

the filing of the *Weinberger* stockholder derivative action on November 17, 1987 alleging breach of fiduciary duty and breach of contract).[7/]

REASONS FOR GRANTING THE PETITION

The questions presented by this petition represent important questions of federal law which have not been but should be settled by this Court, including decisions by the Ninth Circuit which are in conflict with the decisions of one or more circuits, and also involve decisions by the Ninth Circuit and the lower court which are in direct conflict with the relevant decisions of this Court including in respect of FRCP Rules 23 and 24 and the Court's *General Tel. Co. v. Falcon* and *American Pipe* line of cases.

The questions presented are important and compelling in the sense that they affect the substantial number of Rule 10b-5 class action cases processed by the courts each year and the efficient system-wide administration of such cases.

[7/] This action was filed on November 16, 1990. The first Rule 10b-5 action (*Model* consolidated into *In re Gibraltar*), was filed November 23, 1987. All of the Gibraltar management defendants, except Young, and accounting defendants named therein were dismissed out of the *In re Gibraltar* case on or after June 20, 1988. The settlement in *re Gibraltar* was finalized (and the non-settling defendants were dismissed), and the case was dismissed, on September 19, 1989. John Glavaris filed a notice of exclusion from the class action settlement in *In re Gibraltar* on July 28, 1989. The "worst case" analysis which plaintiffs could conceivable face would be for the statute of limitations to begin running on October 30, 1987, toll the running of the statute from November 23, 1987 through June 20, 1988, and commence the re-running of the statute from June 21, 1988 through November 16, 1990 when this action was filed - - a total of less than three years.

The question presented concerning the application of theories of fraudulent concealment, equitable tolling and equitable estoppel to the statute of limitations for Rule 10b-5 cases is very important particularly in the facts and circumstances of this case where the court adopted constructive notice as the basis to commence the running of the statute of limitations but declined to toll the running of such statute, or otherwise deny the defendants the benefit of such statute, where the defendants sought to mislead investors into believing they had no claims through the use of the purported special investigation and determination by such "independent" committee that there was no factual basis for the assertion of any claims by Gibraltar investors against Gibraltar's management (or presumably the members of the investigating committee and their professional advisors).

This case is also important in that it involves the application of Rule 10b-5 to accounting, attorney and financial public relations professionals who participated directly in the development, implementation and concealment of the underlying fraud. Accountants devised methods to perpetrate an accounting fraud involving, among other things, the transfer of the Galleria off Gibraltar's balance sheet to avoid audit. Financial public relations advisors wrote releases, president's letters and speeches for public dissemination to Gibraltar investors which they knew were not true. Attorneys knew about and participated in the fraud being perpetrated on the investing public, and made public announcements designed to cover-up and conceal such fraud and to mislead investors as to the existence of claims against such defendants. See the Second Amended Complaint, at Appendix E hereto.

For the reasons set forth herein, the Court is respectfully requested to grant this petition and decide the within important federal questions.

Rules 23 and 24

The decision of the court, which was affirmed by the Ninth Circuit, severely undermines Rules 23 and 24 of the Federal Rules of Civil Procedure ("FRCP") and is contrary to the decisions of this Court interpreting such Rules and the important class action procedure provided for therein.

In the past, this Court has reviewed and offered guidance in respect of the decisions of the courts of appeal interpreting and applying Rules 23 and 24 in a manner which this Court believed did not fulfill the intended purpose and objectives of such Rules. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *United Airlines Inc. v. McDonald*, 432 U.S. 385 (1976), *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *vacated and remanded* in light of *Crown Cork*, 103 S.Ct. 352 (1983) ("American Pipe cases").

Binder And The Fidels' Motion To Intervene Was Entirely Consistent With And Appropriate Under FRCP Rules 23 And 24 And This Court's *American Pipe* Cases

In accordance with this Court's *American Pipe* line of decisions interpreting FRCP Rules 23 and 24, the court should have permitted amendment of the complaint in this case so as to allow one or more additional plaintiffs and proposed class representatives to intervene in the instant action (including after the court had announced its decision to redefine the class set forth in the complaint in a manner which jeopardized the continued maintenance of the case as a Rule 23 class action relating to the adequacy of the claim

and/or representation of the named plaintiffs).[8/]

Intervention in the context of a FRCP Rule 23 class action is governed by both Rule 23 and 24.[9/] The Advisory Committee Notes to Rule 23, in respect of the 1996 Amendment, provide, as follows:

> "A class member who claims that his 'representative' does not adequately represent him, and is able to establish the proposition with sufficient probability, should not be put to the risk of having judgement entered in the action which by its terms extends to him, and be obliged to test the validity of the judgement as applied to his interest by a later

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[8/] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974) (commencement of the class action suit fulfills the policies of repose and certainty inherent in the limitations provisions and tolls the running of the period otherwise provided by the statute); and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983) (Rule 23 tolling applies to all members of the putative class; the filing of the complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment; the defendants will be aware of the need to preserve evidence and witnesses respecting the claims of all members of the class; tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights if the class is not ultimately certified).

[9/] See, for example, FRCP Rule 23(c)(2)(C) providing for notice to absent class members so that they may enter an "appearance" through their own counsel.

collateral attack. Rather he should, as a general rule be entitled to intervene in the action".

The motion by Binder and the Fidels to intervene in *Glavaris* appears to fall squarely within the guidelines set forth in such Notes in favor of intervention by putative class members who have some concern about the adequacy of representation that will be provided by the named class representative. In the instant case, on August 30, 1991, the plaintiffs-in-intervention, before any answer had been filed, before any discovery had been conducted and during the time period when the court had issued an order staying the proceedings in this case pending the court's decision in respect of all of the defendants' motions to dismiss, filed a motion to intervene as plaintiffs and class representatives on behalf of the putative class claimants. The court denied the motion without explanation (other than the court's brief statement at the hearing on such motion to the effect that it was "too late" to allow any new plaintiffs to come into the case).[10/] The plaintiffs-in-intervention, as it subsequently turned out based on the court's memorandum of decision dated September 8, 1992 ("MOD#1"), purchased Gibraltar bonds in the time frame the court subsequently defined as period 2 (November 4, 1987 through April 3, 1989). Following issuance of the court's MOD#1, re-defining the class and dismissing the plaintiffs and the class' period 2 bondholder claims for lack of a plaintiff who purchased any

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[10/] The court's minute order dated October 7, 1991 reads, as follows: "Court denies motion to intervene as party plaintiffs". The court's MOD #2 was issued August 10, 1994. The only answer to the complaint, by defendant Young to John Glavaris' individual Rule 10b-5 and related state law claims, was filed on February 23, 1995 (while the proposed settlement of the remaining claims by John Glavaris against defendant Young was pending before the court).

Gibraltar bonds in such newly created class period, Binder and the Fidels tried to revive their motion to intervene, seeking to represent the class of bondholders who had purchased Gibraltar's bonds in the period which the court defined as "period 2", but the court refused to allow such intervention indicating that the court had already reconsidered and confirmed its prior ruling denying such plaintiffs-in-intervention (or, presumably, any member of the class) the right to intervene as named plaintiffs in the *Glavaris* action in order to save and protect the bondholder class' claims.[11/] Such "second" ruling came at a time when the court's stay of the proceedings in *Glavaris* was still in effect, no answers had been filed and no discovery had been conducted. The plaintiffs-in-intervention sought to come into *Glavaris* to protect their own and the class' interests in respect of claims which were the same or similar to such class members' claims. Immediately after the issuance of the court's MOD#1 (no intervention by such plaintiffs allowed), on September 22, 1992 Binder and the Fidels filed their own separate bondholder class action (USDC Case No. CV-92-5715-MRP), and the same court refused to apply Rule 23 tolling or Section 27A of the Securities Exchange Act of 1934 (*Lampf* "savings" legislation[12/]), and dismissed such action in its entirety based on statute of limitations grounds which the court determined to have expired between the time Binder/Fidel sought to intervene in *Glavaris* and the filing of their separate action.

[11/] The court's last order on the subject, dated June 21, 1995, in *Glavaris* reads: "As the Minutes for October 7, 1991 reflect, the Court denied the motion to intervene in open court and reconsidered and reaffirmed its ruling in its Second Memorandum at page 34".

[12/] *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, *reh'g denied*, (1991).

The court's decisions in respect of the Binder and the Fidels' motion to intervene in the instant action, affirmed by the Ninth Circuit, are inconsistent with FRCP Rules 23 and 24(a) and this Court's *American Pipe* line of cases. It is, therefore, appropriate and necessary that the Court grant the instant petition and again address and issue guidance in respect of the relationship and application of Rules 23 and 24 to class action litigation throughout the federal system.

In *American Pipe, supra,* this Court reversed a district court's refusal to allow a member of the putative class to intervene in such suit following the court's refusal to certify such suit as a class action under FRCP Rule 23. This Court's *American Pipe* line of decisions, including *Crown Cork* and *United Airlines, supra,* enunciate as governing principles under FRCP Rules 23 and 24 that putative class members may properly seek to and should be allowed to intervene in Rule 23 actions both before and after the court has made a determination as to the class action status of any such suit under Rule 23, provided that such intervenor's claims include common issues of fact and law which predominate over the other issues attending such respective cases; and that, pending such determination of class action status, the statute of limitations is tolled as to the claims of all putative class members, whether they seek to intervene or not, whose claims would be covered by the putative class allegations as set forth in the complaint if such action is allowed to proceed as a class action under Rule 23. Binder and the Fidels' right to intervene in this action is consistent and appropriate with this Court's *American Pipe* reasoning and line of decisions.

The settlement of *In re Gibraltar*, prior to any determination as to the class action status of such case(s) under Rule 23 (other than the stipulated settlement class), not only did not preclude the subsequent filing of the within

Glavaris action covering stock and bondholder claims which were not part of such settlement (and the application of Rule 23 tolling covering such unresolved class claims), but the filing of such subsequent class action was entirely consistent with the purposes and objectives of Rule 23 and this Court's long-standing decisions in respect of such matters.

The court's refusal to allow Binder and the Fidels to intervene in the *Glavaris* action as representatives for bondholder "period 2" claims (and stockholder claims against non-settling defendants) also implicates and is inconsistent with this Court's decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (the purported class representative need only be part of the class and possess "the same interest and suffer the same injury as the class members"). The incurrence and fraudulent concealment of substantial losses, attributable to Gibraltar's commercial real estate and bond portfolios and threatening Gibraltar's financial condition, regulatory standing and continued viability, extended throughout the class period as defined in the complaint and resulted in a common injury (the loss of savings invested in Gibraltar securities) from a common cause (false and misleading securities disclosures by corporate mangers and professionals which were hidden from investors for the approximately two and one-half year period covered by this action and thereafter).

In accordance with Rule 23 and this Court's decision in *Falcon*, the named plaintiffs including John Glavaris should have been permitted to assert their individual claims, and to act as class representatives, in each of the three time periods defined by the court for purposes of determining the defendants' Rule 12 (b)(6) motions. The plaintiffs and the class' claims arose out of the same securities disclosure documents and omissions therefrom and the same fraudulent course of conduct and actions by the defendants; and such

facts were related and on-going throughout the entire class period and, therefore, involved common issues of fact and law.[13/]

Further, the court should have ruled on the defendants Rule 12 motions based on the allegations set forth in the complaint (including the definition of the Rule 23 class period) and deferred until the motion for class certification any determination as to whether or not such allegations satisfied Rule 23's requirements, and the advisability of creating any sub-classes to enhance the administration of the class action which the court was willing to certify as complying with Rule 23.

The Court Should Not Have Foreclosed Application Of Principles Of Fraudulent Concealment, Equitable Tolling Or Equitable Estoppel To Deny The Defendants The Benefit Of The Statute Of Limitations Given The Defendants' Public Representations As To The Absence Of Actionable Conduct By Such Defendants

Following the October 30th loss announcement, and the filing of the *Weinberger* shareholder derivative action for breach of fiduciary duty, and the initial *Model* Rule 10b-5 action (consolidated into *In re Gibraltar*) filed on

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[13/] The false and misleading nature of the October 30th release and the resulting press reports thereon disseminated on or about November 3, 1987 (failure to disclose the actual nature, reasons and timing of previously existing and unreported real estate losses and the existence of substantial losses attributable to Gibraltar's bond portfolio threatening Gibraltar's regulatory good standing, financial condition and ability to continue as a going concern) inextricably linked the fraud in the time frames the court described as periods 1 and 2.

November 23, 1987, Gibraltar announced that a special investigation committee, composed of the "outside" members of Gibraltar's Board of Directors and aided by Gibraltar's outside general counsel and an independent accounting firm, had been constituted to investigate the facts and circumstances surrounding the losses which were the subject of such loss announcement. On August 12, 1988, in connection with the settlement of the *Weinberger* action (without the payment of any compensation by any defendant to Gibraltar), Gibraltar and its attorneys publicly reported that the special investigation committee could find no evidence of any actionable conduct by Gibraltar's management.[14/] Thereafter, Gibraltar's outside accountants, attorneys and financial public relations firm continued to represent Gibraltar, including in respect of securities registration and disclosure matters and, in the case of such attorneys, litigation where such counsel represented both Gibraltar and its management.

[14/] To the contrary, the members of the special investigation committee and counsel knew about the FHLB's "unsafe and unsound" report and the unreported loss of $500 million attributable to Gibraltar's portfolio of unhedged fixed rate mortgage-backed securities, the absence of appraisals which Gibraltar had been representing were used to value Gibraltar's real estate development properties, the cancellation of the appraisal on the Galleria and the unreported loss represented thereby, the secret issuance of two different sets of audited financial statements for the period ended December 31, 1996, the temporary transfer of the Galleria off of Gibraltar's balance sheet at December 31, 1996, and the existence of the capital maintenance agreement whereby GFC had obligated itself to maintain Gibraltar Savings' capital at regulatory minimums; and they, therefore, knew such matters, and the concealment thereof, represented actionable conduct by Gibraltar's management, themselves and Gibraltar's outside professionals.

In refusing to apply recognized principles of fraudulent concealment, equitable tolling and/or equitable tolling to the plaintiff's Rule 10b-5 (and related state law claims), to deny the defendants the benefit of any "constructive notice" statute of limitations defense, the court in effect determined that Gibraltar's public investors were capable of conducting their own investigation and of actually uncovering the actionable conduct by the defendants which the Gibraltar special investigation committee, aided by Gibraltar's long-time general counsel and an independent accounting firm, reported they could not find and that no member of the financial press was able to discern.[15/]

Application of Rule 10b-5 in an environment of fraudulent concealment by corporate defendants against such corporation's public investors, whether viewed in a pre or post-*Lampf* setting, should not result in the summary

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[15/] Even if an investor had suspected something more than was reported by Gibraltar and the press regarding Gibraltar's real estate loss announcement, and had considered inquiring into possible wrongdoing pertaining to such matter, it would have been virtually impossible for any such person - - given the resources and access customarily available to the average public investor - - to even begin to discover the wrongdoing which the defendants had been and continued to systematically cover-up and conceal. It is also reasonable to assume that, when the result of the "special investigation" purportedly conducted by Gibraltar and its attorneys was announced (no finding of any actionable conduct by Gibraltar's management), whatever suspicions might otherwise have existed regarding the October 30th loss announcement would have been completely dispelled by such "clean bill of health". (There were no reports of any Government investigations, or even any inquiries, including by the SEC, FHLB, FDIC, FSLIC and/or the California Department of Savings and Loan regarding Gibraltar including the losses which were the subject of the October 30th release).

dismissal of claims by such public investors against such alleged wrongdoers.

Application of fraudulent concealment, equitable tolling and/or equitable estoppel in the instant *In re Gibraltar Glavaris* case, in light of the preceding class action litigation against defendants named therein (and, possibly, their counsel), would be entirely consistent with this Court's prior Rule 23 tolling decisions. As the Court indicated in *American Pipe* (414 U.S. at 559), commencement of the class action suit (*In re Gibraltar*) fulfills the policies of repose and certainty inherent in the limitations provisions (including Section 9(e) of the Securities Exchange Act) and tolls the running of the period otherwise provided by the statute.

A Difference Of Opinion Exists Between The Circuit Courts As To The Interferences To Be Drawn From The Pleading And Proof Of A Pattern Of Racketeering Activity To Establish For Pleading Purposes The Existence Of A RICO Enterprise

The court dismissed plaintiffs' RICO claim against all defendants, without leave to amend, based on the grounds that the complaint failed to adequately plead a RICO "enterprise"[16/], and rejecting the proposition that such

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[16/]Prior to the affirmation of the lower court's decision on the issue of the plaintiffs' having adequately pled a RICO "enterprise", which the appellants described in their briefs to the Ninth Circuit as a "key" issue to be decided in the appeal, the Ninth Circuit had not previously had the occasion to address such issue. See *United Energy Owners v. United Energy Management*, 837 F.2d 356, 363 (9th Cir. 1988). It is fairly understood from the Ninth Circuit's disposition of the appeal (affirmance in respect

enterprise can be inferred from the allegations pled to establish a "pattern of racketeering activity".[17/] Although the Ninth Circuit rejected the plaintiffs' argument on appeal, and affirmed and adopted the lower court's dismissal of the plaintiffs' RICO claim as a result of the complaint's failure to plead a RICO "enterprise", the Third Circuit has adopted a

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of such key question, and the language to the effect that such appellate court was adopting "the thorough and well reasoned" decision of the District Court as its own in respect of this "no enterprise" issue) and that such decision is in conflict with the determination of the Third Circuit which was cited to the Ninth Circuit as the basis for reversal of the District Court's decision on this point.

[17/]MOD#1, 52d ("Plaintiffs allege the conclusion that the defendants constituted an association in fact and an enterprise which operated separately and distinctly from Gibraltar but failed to allege any facts which would permit an inference that this group actually did operate separately and distinctly from GFC or Gibraltar Savings"). Plaintiffs respectfully disagree; and submit that what the court actually did was to refuse to provide the plaintiffs with the benefit of favorable inferences which could and should have been drawn from the substantial facts pleaded in respect of the RICO defendants' enterprise and racketeering activities. The court also concluded that the complaint having failed to allege any mail or wire fraud claims, or any federal securities law claims against any of the defendants (the one exception being John Glavaris' individual Rule 10b-5 claims against defendant Young, which securities claim was not referenced in the RICO section of the court's MOD #1), complaint could not, therefore, state a pattern of racketeering based on such dismissed securities claims. The court further indicated that, in any event, plaintiffs' securities claims allegations, based on Rule 10b-5's customary "in connection with the sale of securities" standing allegations, were legally deficient to satisfy RICO's "fraud in the sale of securities" racketeering activity definition. MOD#1; RICO §1961(1).

contrary position in holding that the enterprise can be inferred from proof of the pattern of RICO activities alleged in the complaint. *U.S. v. Pelullo*, 964 F.2d 193, 212 (3rd Cir. 1992).

In *Pelullo*, the Third Circuit observed that there are not necessarily two separate tests for lawful and unlawful enterprise activity; that the requisite *elements* of enterprise and pattern do not differ in these settings, rather it is the *proof* necessary to establish these elements that may or may not differ. In *Turkette*, this Court indicated that an enterprise is an "entity separate and apart from the pattern of activity in which it engages", but also stated that the elements of proof of the enterprise and the pattern may coalesce in particular cases. *U.S. v. Turkette*, 452 U.S. 576 (1981)(proof of the existence of an enterprise is made "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"). In cases where the enterprise is alleged to be an association-in-fact of individuals, it is likely that the elements of proof establishing the enterprise and the racketeering activity can be the same.

It is submitted that in the instant association-in-fact "enterprise" case, the same allegations (and the favorable inferences to be drawn therefrom) can and do satisfy plaintiffs' pleading burden as to both the "enterprise" and the "racketeering activity" elements of the plaintiffs' RICO claim as pled in the complaint.

Claims Against Certain Professionals

Accounting defendant Kenneth Leventhal & Co acted as outside independent accountants for Gibraltar's real estate partnerships and their reports on such partnerships' financial statements were relied upon by Gibraltar's auditors of record

(Ernst & Whinney and Peat Marwick) whose opinions appeared in Gibraltar's published securities registration and disclosure documents. The complaint alleges that Leventhal was the principal architect of the Gibraltar "accounting fraud". The court dismissed Leventhal on the grounds that none of the published statements alleged to be false and misleading were publicly attributed to Leventhal (no Leventhal audit report accompanied Gibraltar's published financial statements), and the court rejected plaintiffs' argument that Leventhal's ("nonverbal") conduct was actionable under Rule 10b-5(a) and (c). Similarly, the court ruled that attorney defendant Gibson, Dunn & Crutcher, general counsel to Gibraltar responsible for drafting disclosure items alleged to be false and misleading, was under no obligation to disclose any information to investors; and the court rejected plaintiffs' arguments to the contrary, including that Gibson's role as "press secretary" for Gibraltar and the special investigation committee (and service as counsel for such committee) obligated such defendant to make affirmative disclosure of information necessary to correct false and misleading information and to refrain from making false or misleading statements to investors. The court also dismissed defendant Rifkind, Pondell & Parson (financial public relations firm) on the grounds that none of the alleged false or misleading statements were publicly attributed to Rifkind and that such defendant was not otherwise liable for fraudulent (non-verbal) conduct under Rule 10b-5. The court's decisions were inconsistent with Rule 10b-5 and this Court's decisions in *Affiliated Ute Citizens v. Utah*, 406 U.S. 128 (1972), and *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994).

CONCLUSION

The perpetration of the "special investigation" fraud and concealment (like the defendants' false protestation that

there was no basis for the Government seizure of Gibraltar Savings in April of 1989) should have been sufficient to sustain, or at least preserve for the trier of fact, the plaintiffs' fraudulent concealment and other equitable allegations intended to deny the defendants the benefit of any "limitations of actions" defense which might otherwise be invoked by such defendants in an effort to escape accountability for their wrongdoing. Investor rights, and the purposes of the federal securities laws, are being seriously undermined by the lack of judicial articulation in respect of the application of a constructive notice rationale to summarily cut-off public investor claims against public corporation defendants in Rule 10b-5 securities cases. It is submitted that active concealment of operative facts indicative of wrongdoing by defendants should automatically foreclose the use of the statute of limitations defense by defendants engaged in such fraudulent concealment. This Court is requested to utilize this case to establish that the presence of a "special investigation" by corporate wrongdoers to cover-up and conceal their own actionable conduct, from the people whom they are duty bound to inform and protect, is not protected activity under Rule 10b-5 (including under this Court's decision in *Lampf)*. The court's unwillingness to allow members of the class to intervene in *Glavaris*, the court's failure to apply Rule 23 tolling to preserve the claims of the *Glavaris* plaintiffs and the class and the court's disassembly and reconstruction of the class period pled in the complaint for purposes of its ruling on the defendants' Rue 12(b)(6) motions, were individually and collectively in contravention of this Court's *American Pipe* line of decisions in furtherance of the purposes, objectives and application of Rule 23 to securities class action litigation. The Court is respectfully requested to grant this petition.

Dated: August 29, 1998

Respectfully submitted,

ROBERT H. BRETZ, P.C.

By: s/ Robert H. Bretz
Attorney for Petitioners